

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 CENTRAL PUGET SOUND REGION
3 STATE OF WASHINGTON
4

5 SHOREWOOD NEIGHBORHOOD
6 PRESERVATION COALITION,

7 Petitioner,
8

9 v.

10 CITY OF BURIEN,
11

12 Respondent,
13

14 and

15 NO CHILD SLEEPS OUTSIDE, LLC and
16 MARY'S PLACE SEATTLE,

17 Intervenors.
18

Case No. 19-3-0005

FINAL DECISION AND ORDER

19
20 **SYNOPSIS**

21 *Shorewood Neighborhood Preservation Coalition (Petitioner) challenged City of*
22 *Burien's December 17, 2018, adoption of Ordinance No. 701. The Board concluded that the*
23 *Petitioner had failed to meet its burden of proof that the adoption of the Ordinance violated*
24 *any provision of the GMA.*
25

26 **I. INTRODUCTION**

27 Mary's Place operates a facility serving homeless families and families with children
28 experiencing life-threatening illnesses at 12845 Ambaum Boulevard Southwest (the
29 Property). The City's "Planned Land Use Intensity" maps designate the Property as "High
30 Intensity," but the existing Future Land Use Map (FLUM) zoned the property as "Office," and
31 would not permit the number of multifamily units that Mary's Place had planned for this
32

1 Property.¹

2 Thus, in February 2018, Mary's Place applied to the City of Burien (City) for an
3 amendment to the Future Land Use Map (FLUM) that would change the designation of
4 12845 Ambaum Boulevard Southwest (the Property) from "Office" to "High Density
5 Multifamily Neighborhood." ²

6 On November 30, 2018, the City issued its programmatic SEPA FEIS Addendum for
7 the amendment, noting that a project-specific SEPA Checklist would be required for any
8 future projects exceeding SEPA thresholds.³ The Burien City Council adopted Ordinance
9 701, which included the requested amendment for Mary's Place, on December 17, 2018.
10

11 Shorewood Neighborhood Preservation Coalition (Petitioner) participated in the
12 public process leading up to the adoption of the Ordinance, expressing its objections, and
13 now challenges the adoption of Ordinance 701 as violating the Growth Management Act
14 (GMA) and the State Environmental Policy Act (SEPA). Petitioner argues that the
15 amendments are inconsistent with countywide planning policies and with the City's existing
16 comprehensive plan, that the City failed to comply with its own criteria for approving
17 amendments, and that the City failed to comply with SEPA requirements.
18

19 Procedural history of the case is detailed in Appendix A. All legal issues as
20 established in the Prehearing Order are set out in Appendix B.
21

22 II. BOARD JURISDICTION

23 The Board finds the Petition for Review was timely filed⁴ and that Petitioner has
24 standing to appear before the Board.⁵ The Board also finds it has jurisdiction to review the
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28 ¹ Shorewood Brief at 2 "...the FLUM map amendment, unaccompanied by a zoning amendment, would create
29 an inconsistency between the two."

² City and Intervenor's Response at 3.

30 ³ *Id.* at 4, citing Tab 6, SEPA Addendum at 000711 "Specific development proposals may require a project
31 specific SEPA checklist that will evaluate specific potential impacts of any development proposal that is above
the prescribed exemption levels."

32 ⁴ RCW 36.70A.290(2).

⁵ RCW 36.70A.280(2).

1 issues stated in the complaint for compliance with the Growth Management Act (GMA).⁶

3 III. STANDARD OF REVIEW

4 Comprehensive plans and development regulations, and amendments to them, are
5 presumed valid upon adoption.⁷ This presumption creates a high threshold for challengers
6 as the burden is on the petitioner to demonstrate that any action taken by the City fails to
7 comply with the GMA.⁸ The Board is charged with adjudicating GMA compliance and, when
8 necessary, invalidating noncompliant plans and development regulations.⁹

9 The scope of the Board's review is limited to determining whether a City has
10 achieved compliance with the GMA only with respect to those issues presented in a timely
11 petition for review.¹⁰ The Board is directed to find compliance unless it determines that the
12 challenged action is clearly erroneous in view of the entire record before the Board and in
13 light of the goals and requirements of the GMA.¹¹

16 IV. ANALYSIS AND DISCUSSION

17 INCONSISTENCY

18 In **Issue No. 2**, Petitioner alleges that Ordinance 701 is inconsistent with
19 compatibility requirements of GMA policy and King County Countywide Planning Policies
20 DP-38, DP-40, DP-44, in violation of WAC 365-196-405(2)(k).¹²

25 ⁶ RCW 36.70A.280(1).

26 ⁷ RCW 36.70A.320(1).

27 ⁸ RCW 36.70A.320(2).

28 ⁹ RCW 36.70A.280, RCW 36.70A.302.

29 ¹⁰ RCW 36.70A.290(1).

30 ¹¹ RCW 36.70A.320(3). In order to find the County's action clearly erroneous, the Board must be "left with the
31 firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201
32 (1993).

¹² **Issue No. 2** Does the ordinance fail to achieve consistency with the compatibility requirements of GMA
policy WAC 365-196-405(2)(k), and King County Countywide Planning Policies DP-38, DP-40, DP-44, in
violation of , as required by BCC 19.65.095.6.B, in violation of RCW 36.70A.100; RCW 36.70A.130; RCW
36.70A.140; RCW 36.70A.210(1); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); and
WAC 365-196-600(10)?

1 **Applicable Law:**

2 **WAC 365-196-405 Land use element.** (2) Recommendations for meeting requirements.
3 The land use assumptions in the land use element form the basis for all growth-related
4 planning functions in the comprehensive plan, including transportation, housing, capital
5 facilities, and, for counties, the rural element. ...The following steps are **recommended** in
6 preparing the land use element:

7 (k) Counties and cities **may** prepare an implementation strategy describing the
8 steps needed to accomplish the vision and the densities and distributions
9 identified in the land use element. Where greater intensity of development is
proposed, the strategy **may** include a design scheme to encourage new
development that is compatible with existing or desired community character.

10 **King County Countywide Planning Policies**

11
12 DP-39 Develop neighborhood planning and design processes that **encourage** infill
13 development, redevelopment, and reused of existing buildings and that, where appropriate
14 based on local plans, **enhance the existing community character** and mix of uses.

15 DP-40 Promote a **high quality** of design and site planning in publicly funded and private
16 development through the Urban Growth Area.

17 DP 44 Adopt design standards or guidelines that foster infill development that is compatible
18 **with the existing desired or urban character.** [Emphasis by Petitioner.]

19
20 Petitioner's argument rests on an assumption that the amendment will be
21 incompatible with existing uses, that if the Board considers the project "as if it will be
22 developed to its fullest potential as multi-family housing," it is "incompatible with existing
23 uses."¹³ While the Petitioner describes the residential use contemplated by the amendment
24 as up to 75 feet in height and "13 times more density than the RS-12,000 zone,"¹⁴ the
25 argument fails to accomplish its singular purpose: to prove that the amendment is in conflict
26 with a specific County-wide Planning Policy, in violation of a specific requirement of the
27 GMA.

28
29 Petitioner cites *Lawrence Michael Investments LLC v. Town of Woodway*,
30 CPSGMHB No. 98-3-0012 (FDO, January 8, 1999) at 39 for the proposition that "[e]ven a
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32 ¹³ Shorewood Brief at 10.

¹⁴ Shorewood Brief at 11.

1 site-specific amendment may not violate the Countywide Policies.”¹⁵ However, as the City
2 and Intervenor’s point out,¹⁶ that case cannot support an evaluation of the challenged
3 ordinance for compliance with DP-39, DP-40 and DP-44, as these policies describe
4 processes that local governments *should* pursue.

5 Although Petitioner argues that a GMA requirement here is created by WAC 365-
6 196-405(2)(k), these WACs are procedural and advisory, not mandatory. This chapter of the
7 Washington Administrative Code is titled Growth Management Act – Procedural Criteria for
8 Adopting Comprehensive Plans and Development Regulations and is authorized by RCW
9 36.70A.190(4)(b),¹⁷ which calls on the department (the Department of Commerce) to
10 establish a program of technical assistance. WAC 365-196-030 makes clear that
11 compliance with these criteria is not a prerequisite for compliance with the Act, and that
12 while the Board should consider these criteria, “determination of compliance must be based
13 on the act itself.”¹⁸ The WAC’s purpose is to provide assistance, but reflects the regulators’
14 understanding that “[t]he department’s purpose is to provide assistance in interpreting the
15 act, not to add provisions and meanings beyond those intended by the legislature.”¹⁹
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20 ¹⁵ Shorewood Brief at 9.

21 ¹⁶ City and Intervenor’s Response at 22.

22 ¹⁷ RCW 36.70A.190 (4) The department shall establish a program of technical assistance: (b) Adopting by rule
23 procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations
24 that meet the goals and requirements of this chapter. These criteria shall reflect regional and local variations
25 and the diversity that exists among different counties and cities that plan under this chapter.

26 ¹⁸ WAC 365-196-030 **Applicability.** ... (2) Compliance with the procedural criteria is not a prerequisite for
27 compliance with the act. This chapter makes recommendations for meeting the requirements of the act, it does
28 not set a minimum list of actions or criteria that a county or city must take. Counties and cities can achieve
29 compliance with the goals and requirements of the act by adopting other approaches. (3) How the growth
30 management hearings board use these guidelines. The growth management hearings board must determine,
31 in cases brought before them, whether comprehensive plans or development regulations are in compliance
32 with the goals and requirements of the act. When doing so, board must consider the procedural criteria
contained in this chapter, but determination of compliance must be based on the act itself.

¹⁹ WAC 365-196-020 **Purpose.** (1) Within the framework established by the act, counties and cities may
accommodate a wide diversity of local visions. There is no exclusive method for accomplishing the
requirements of the act. (2) In light of the complexity and difficulty of the task, the legislature required the
department to establish a technical assistance program. As part of that program, the department must adopt
by rule procedural criteria to assist counties and cities in adopting comprehensive plans and development
regulations that meet the goals and requirements of the act. (3) Definitions and interpretations made in this
chapter by the department, but not expressly set forth in the act, are identified as such. The department’s

1 To restate, the Board must find compliance unless it determines that the action is
2 clearly erroneous "in light of the goals and requirements of this chapter."²⁰ This jurisdictional
3 limitation has been recognized by the state's Supreme Court:

4 However, the growth management hearings boards do not have authority to
5 make "public policy" even within the limited scope of their jurisdictions, let alone
6 to make statewide public policy. The hearings boards are quasi-judicial
7 agencies that serve a limited role under the GMA, with their powers restricted to
8 a review of those matters specifically delegated by statute. See RCW
9 36.70A.210(6), .280(1); *Sedlacek v. Hillis*, 145 Wn.2d 379, 385-86, 36 P.3d
10 1014 (2001) (stating that public policy is set forth in constitutional, statutory,
11 and regulatory provisions, as well as prior judicial decisions). . . . See also
12 *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542,
13 565, 958 P.2d 962 (1998) (stating that the GMA is not to be construed to confer
14 upon a hearings board powers not expressly granted in the GMA).²¹

15 The Petitioner has not demonstrated that the changed zoning in Ordinance 701 will,
16 in fact, create a structure that is incompatible with the surrounding neighborhood. Nor have
17 they proven that Mary's Place site development will thwart or preclude achievement of any
18 countywide planning policies. The City has yet to process the actual development permit,
19 apply the SEPA checklist and apply design standards. Petitioner has not identified a specific
20 GMA requirement with which the City has failed to comply in order to persuade the Board
21 that a violation has occurred.

22 **The Board finds and concludes** that Petitioner has not met its burden of proof that
23 the amendment created inconsistencies with the Countywide Planning Policies in violation
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27 purpose is to provide assistance in interpreting the act, not to add provisions and meanings beyond those
28 intended by the legislature. . . .

29 ²⁰ RCW 36.70A.320(3) In any petition under this chapter, the board, after full consideration of the petition, shall
30 determine whether there is compliance with the requirements of this chapter. In making its determination, the
31 board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find
32 compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view
of the entire record before the board and in light of the goals and requirements of this chapter. See, in this
regard, *Homeward Bound v. City of Puyallup*, GMHB No. 18-3-0011 (Final Decision and Order, June 3, 2019)
at 25 and *Peranzi v. City of Olympia*, GMHB No. 11-2-0011 (Final Decision and Order, May 4, 2012) at 6.

²¹ *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129 (2005).

1 of the GMA.

2 In **Issue 3**, Petitioner alleges that the amendment fails to meet the consistency
3 criteria in Burien Comprehensive Plan policy RE 1.9, LU 1.6, and the Salmon Creek
4 Neighborhood Plan Policy HO 5.1.2, as required by RCW 36.70A.070 and .130(1)(d).²²
5

6 **RCW 36.70A.070 Comprehensive plans—Mandatory elements.** The comprehensive plan
7 of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist
8 of a map or maps, and descriptive text covering objectives, principles, and standards used
9 to develop the comprehensive plan. The plan shall be an internally consistent document and
10 all elements shall be consistent with the future land use map.

11 **RCW 36.70A.130(1)(d) Comprehensive plans – Amendments.** Any amendment of or
12 revision to a comprehensive land use plan shall conform to this chapter. Any amendment of
13 or revision to development regulations shall be consistent with and implement the
14 comprehensive plan.

15 Petitioner argues that the Burien Comprehensive Plan – Land Use Goal (LU) 1.6
16 requires that development must be compatible with “the envisioned character, scale, and
17 design of surrounding development.”²³ Petitioner relies on the low buildings and open space
18 of the surrounding neighborhood to conclude that the amendment “is clearly incompatible
19 with these.”²⁴ Further, Petitioner avers that the Salmon Creek Plan²⁵ explicitly requires that
20 single-family housing is the intended character of the neighborhood, and thus the
21 amendment does not comply with this neighborhood plan.²⁶
22

23 The City notes that the actual wording of the policy does not support Petitioner’s
24 argument. LU 1.6 establishes a policy to “encourage” compatible development, not to
25 require specific compatibility. “Compatibility may also be encouraged through development
26

27 ²² **Issue No. 3** By failing to meet the criteria in Burien Comprehensive Plan policy RE 1.9, LU 1.6, and the
28 Salmon Creek Neighborhood Plan Policy HO 5.1.2, does the ordinance fail to achieve consistency with the
29 comprehensive plan, as required by BCC 19.065.095.6.B, and create an internally inconsistent comprehensive
30 plan, all in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-
31 196-600(3); and WAC 365-196-600(10)?

32 ²³ Tab 3 at 48.

²⁴ Shorewood Brief at 13.

²⁵ Tab 3 at 447, Shorewood Brief at 14.

²⁶ *Id.*

1 regulations, design guidelines, permit conditions, State Environment Policy Act ("SEPA
2 review), development agreements and more."²⁷

3 Petitioner's brief emphasizes Salmon Creek Neighborhood Plan Policy HO. 5.1.2:
4 Resident ownership of housing is strongly encouraged. The discussion appearing there
5 states "Resident owners are more highly motivated (to care for and maintain) property by an
6 attitude of stewardship due to the personal investment in property as compared to resident
7 renters." As the City counters here, the" Petitioner's arguments depends on reading
8 'encourage resident ownership' as 'prohibit new rental development,' a reading that is
9 contradicted by the text."²⁸

11 As the City points out, any prohibition or discouragement of rentals would run
12 directly contrary to the GMA goals of "[e]ncourag[ing] the availability of affordable housing to
13 all economic segments of the population." RCW 36.70A.020(4)

15 Petitioner next argues that comprehensive plan policy RE 1.9 strictly limits the
16 expansion of multi-family high-density FLUM designations, and that the amendment here
17 fails to meet two of the criteria for expanding this designation. The area is not currently
18 characterized by multi-family development and is not within 1/8 mile of a moderate or high
19 commercial service node.²⁹ Petitioner's argument uses only a limited set of properties for
20 analysis, those abutting or directly across the street from the Mary's Place property. The
21 "area" referred to in RE 1.9 cannot be so circumscribed. As the City notes, the area, as
22 evidenced throughout the record:

24 Is not a single-family neighborhood but an 'auto-oriented commercial and
25 multi-family corridor' along 'Ambaum Boulevard SW, which is a high volume
26 vehicular arterial, are more (sic) commercial and multifamily in nature.' Indeed,
27 a separate map in the Comprehensive Plan recognizes nearly the entirety of
28 Ambaum Boulevard, including the Property, as a 'high-intensity' land use
29 planning area, despite the corridor's adjacency at various points to a 'low-
intensity' area.'³⁰

30 ²⁷ City and Intervenor's Response at 24.

31 ²⁸ *Id.* at 25.

32 ²⁹ Shorewood Brief at 15-16.

³⁰ City and Intervenor's Response at 26, referencing Tab 8, p. 001303 and Tab 3, p. 000046.

1 The Board finds the City's arguments compelling and observes that the two policies
2 relied upon by Petitioner do not make strict requirements but offer encouragement
3 concerning the development of underutilized or vacant land and encouraging home
4 ownership.

5 **The Board finds and concludes** that Petitioner has not met its burden of proof that
6 the amendment created inconsistencies with the Burien Comprehensive Plan or the Salmon
7 Creek Neighborhood Plan, in violation of the GMA's goals and requirements.
8

9 **FAILURE TO MEET CITY CODE CRITERIA**

10 **Applicable Law:**

11
12 **RCW 36.70A130 (2)(a)** Each county and city shall establish and broadly disseminate to the
13 public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that
14 identifies procedures and schedules whereby updates, proposed amendments, or revisions
15 of the comprehensive plan are considered by the governing body of the county or city no
16 more frequently than once every year...

17 **RCW 36.70A.140 - Comprehensive plans—Ensure public participation.**

18 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
19 establish and broadly disseminate to the public a public participation program identifying
20 procedures providing for early and continuous public participation in the development and
21 amendment of comprehensive land use plans and development regulations implementing
22 such plans. The procedures shall provide for broad dissemination of proposals and
23 alternatives, opportunity for written comments, public meetings after effective notice,
24 provision for open discussion, communication programs, information services, and
25 consideration of and response to public comments. ... Errors in exact compliance with the
26 established program and procedures shall not render the comprehensive land use plan or
27 development regulations invalid if the spirit of the program and procedures is observed.

28 **Issues 1, 4, 5, and 6** address the City's failure to meet the procedures and criteria
29 established in Burien Municipal Code (BMC) 19.65.095, subsections A and B.

30 Petitioner argues that the challenged ordinance fails to identify and adopt "the best
31 means for meeting an identified public benefit," (Issue 1), fails to demonstrate a "net benefit
32 to the community," (Issue 4), fails to show that it "will be compatible with nearby uses" a
(Issue 5), and/or "that conditions have changed" so as to render the current designation no

1 longer appropriate (Issue 6). The failure to comply with the City's code provision, Petitioner
2 argues, violates RCW 36.70A.130, RCW 36.70A.140 and the GMA implementing
3 regulations, WAC 365-196-600(3) and WAC 365-196-600(10).³¹

4 Petitioner's assertion is that the Amendment did not meet the criteria established in
5 BMC 19.65.095.6, and thus violated GMA's public participation requirement in RCW
6 36.70A.130(2)(a).
7

8 RCW 36.70A.130(2)(a) requires cities to "establish and broadly disseminate to the
9 public a public participation program," whose components are notice and provision for public
10 meetings, comments and the like, whose overall impact is to provide "procedures providing
11 for early and continuous public participation." RCW 36.70A.140 goes on to say that "Errors
12 in exact compliance with the established program and procedures shall not render the
13 comprehensive land use plan or development regulations invalid if the spirit of the program
14 and procedures is observed."
15

16 Petitioner's argument relies heavily on *McNaughton Group v. Snohomish County*,
17 CPSGMHB No. 06-3-0027 (FDO, January 29, 2007) at 22 for the proposition that "[A]
18 jurisdiction's failure to follow the public participation procedures has adopted pursuant to
19 RCW 36.70A.140 constitutes noncompliance with the [GMA] statute." This case has been
20 cited frequently in recent cases for this proposition, but as that case affirmed, facts matter.
21 In that case, a GMHB challenge to a ten-year update was settled, and the subsequent
22

23 ³¹ As established in the Prehearing Order, these issues are as follows:

24 **Issue No. 1** Does the ordinance fail to identify and adopt "the best means for meeting an identified public
25 benefit," as required by BCC 19.65.095.6.A, in violation of the GMA, RCW 36.70A.130; RCW 36.70A.140; and
the GMA implementing regulations, WAC 365-196-600(3) and WAC 365-196-600(10)?

26 **Issue No. 4** By failing to demonstrate that the amendment "will result in a net benefit to the community," as
27 required by BCC 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-
196-600(3); and WAC 365-196-600(10)?

28 **Issue No. 5** By failing to demonstrate that the amendment "will be compatible with nearby uses," as required
29 by BCC 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-
600(3); and WAC 365-196-600(10)?

30 **Issue No. 6** By failing to demonstrate that "conditions have changed since the property was given its present
31 Comprehensive Plan designation so that the current designation is no longer appropriate; or the map change
will correct a Comprehensive Plan designation that was inappropriate when established," as required by BCC
32 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); and
WAC 365-196-600(10)?

1 challenge was to whether the standards applicable to the County's 1-year annual review
2 were appropriate to the facts, or whether standards for public notice applicable to legislative
3 proposals were in order. The Board found:

4 "The GMA does not require the County in this instance to apply its public
5 participation process that is specific to Docket proposals. The Board finds that
6 the County followed its adopted public process for Type 3 legislative proposals
7 undertaken to resolve an appeal; the County's application of its own procedures
8 is entitled to deference here. The Petitioner has not carried its burden in
9 demonstrating noncompliance with RCW 36.70A.020(11) and .140."³²

10 Further, BMC 19.65.095.6 is not an ordinance having to do with public participation
11 procedures; it concerns the criteria that the City Council will use to approve comprehensive
12 plan amendments. "The City Council may approve or approve with modifications a
13 Comprehensive Plan amendment if all of the [9 listed] criteria are met." This activity occurs
14 at the conclusion of the public participation required by the GMA and is a legislative
15 determination made by the City Council. The Petitioner would have us second-guess the
16 judgments made by the City Council in adopting the amendments, based on the assertion
17 that these judgments are part of the public participation requirements of the GMA. As the
18 City points out, that is not a proper role for the Board; we do not substitute our judgment for
19 the judgment of the local government, absent a clear legal basis.³³

20
21
22 Petitioner must identify a specific GMA requirement with which the City has failed to
23 comply in order to persuade the Board that a violation has occurred. The City code provision
24 does not address public participation procedures and cannot provide a basis for the Board
25 to find a violation of the GMA.

26 **The Board finds and concludes** that Petitioner has not met its burden of proof that
27 the amendment created a violation of the GMA provisions requiring public participation.
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31 ³² *McNaughton* at 23.

32 ³³ *Friends of the San Juans v. San Juan County*, GMHB No. 13-2-0012c (FDO, September 6, 2013) at 1.
Futurewise v. CPSGMHB, 141 Wn. App. 202, 218, 169 P.3d 499, 506-507 (2007).

1 **SEPA COMPLIANCE**

2 Petitioner alleges that the City violated SEPA RCW 43.21C.030(2)(c) in a number of
3 ways. In **Issues 7 and 8**, Petitioner alleges that by failing to conduct a proper review prior to
4 submitting the amendment to the planning commission and/or the City Council, the City
5 violated WAC 197-11-230(1)(a), (b).³⁴ In **Issue 9**, Petitioner alleges that the City's use of a
6 SEPA addendum in this instance violated WAC 197-11-600(3), (4),³⁵ and, in **Issue 10**, that
7 the adverse impacts were sufficiently known so as to require the preparation of an EIS
8 pursuant to WAC 197-11-055 and WAC 197-11-310.³⁶
9

10 No legal argument supporting violation of WAC 197-11-230(1)(a), (b) and WAC 197-
11 11-310 is provided in the brief; therefore, those allegations are deemed abandoned
12 pursuant to WAC 242-03-590(1). Compliance with BMC 19.65.080.2 does not appear in the
13 issues as set forth in the Prehearing Order, and Petitioner's arguments on this matter are
14 not properly before the Board.
15

16 **Applicable Laws:**

17 **RCW 43.21C.030(2)** [Guidelines – All branches of government shall]

18 (c) Include in every recommendation or report on proposals for legislation ... significantly
19 affecting the quality of the environment, a detailed statement by the responsible official on:

20 (i) the environmental impact of the proposed action;

21 (ii) any adverse environmental effects which cannot be avoided should the proposal be
22 implemented;

23 (iii) alternatives to the proposed action;
24

25 ³⁴ **Issue No. 7** By failing to conduct SEPA review prior to submitting the proposed amendment to the Planning
26 Commission, has the City acted in violation of SEPA, RCW 43.21C.030(2)(c) and SEPA implementing
27 regulations, WAC 197-11-230(1)(a), (b)?

28 **Issue No. 8** By failing to conduct SEPA review prior to submitting the proposed amendment to the City
29 Council, has the City acted in violation of RCW 43.21C.030(2)(c) and WAC 197-11-230(1)(a), (b)?

30 ³⁵ **Issue No. 9** By attempting to use a SEPA addendum to analyze the environmental impacts of this
31 amendment, even though the amendment's environmental impacts were not considered in a prior
32 environmental impact statement, and the amendment introduces substantial changes to those impacts that
were previously considered, has the City acted in violation of RCW 43.21C.030(2)(c) and WAC 197-11-
600(3), (4)?

³⁶ **Issue No. 10** Are the probable adverse impacts of the proposal sufficiently well-defined to allow
environmental review at this programmatic stage, and do those impacts require preparation of an EIS, as
required by RCW 43.21C.030(2)(c) and WAC 197-11-055 and WAC 197-11-310?

1 (iv) the relationship between local short-term uses of the environment and the maintenance
2 and enhancement of long-term productivity; and
3 (v) any irreversible and irretrievable commitments of resources which would be involved in
4 the proposed action should it be implemented;

5 **RCW 43.21C.031 Significant impacts.** (1) An environmental impact statement (the detailed
6 statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation
7 and other major actions having a probable significant, adverse environmental impact. The
8 environmental impact statement may be combined with the recommendation or report on
9 the proposal or issued as a separate document. The substantive decisions or
10 recommendations shall be clearly identifiable in the combined document. ...

11 (2) An environmental impact statement is required to analyze only those probable adverse
12 environmental impacts which are significant. Beneficial environmental impacts may be
13 discussed. The responsible official shall consult with agencies and the public to identify
14 such impacts and limit the scope of an environmental impact statement. The subjects listed
15 in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental
16 impact statement.

17 **RCW 43.21C.034 - Use of existing documents.**

18 Lead agencies are authorized to use in whole or in part existing environmental documents
19 for new project or nonproject actions, if the documents adequately address environmental
20 considerations set forth in RCW 43.21C.030. The prior proposal or action and the new
21 proposal ... need not be identical, but must have similar elements that provide a basis for
22 comparing their environmental consequences such as timing, types of impacts, alternatives,
23 or geography.

24 **WAC 197-11-055(2) Timing of review of proposals.** The lead agency shall prepare its
25 threshold determination and environmental impact statement (EIS), if required, at the
26 earliest possible point in the planning and decision-making process, when the principal
27 features of a proposal and its environmental impacts can be reasonably identified.

28 (a) A proposal exists when an agency is presented with an application or has a goal and is
29 actively preparing to make a decision on one or more alternative means of accomplishing
30 that goal *and* the environmental effects can be meaningfully evaluated.

31 (i) The fact that proposals may require future agency approvals or environmental review
32 shall not preclude current consideration, as long as proposed future activities are specific
enough to allow some evaluation of their probable environmental impacts. ...

WAC 197-11-600 When to use existing environmental documents.

(3) Any agency acting on the same proposal shall use an environmental document
unchanged, except in the following cases:

...

1 (b) For DNSs and EISs, preparation of a new threshold determination or
2 supplemental EIS is required if there are:

3 (i) Substantial changes to a proposal so that the proposal is likely to have significant
4 adverse environmental impacts ...; or

5 (ii) New information indicating a proposal's probable significant adverse
6 environmental impacts. ...

7 (4) Existing documents may be used for a proposal by employing one or more of the
8 following methods:

9 ...

10 (c) An addendum, that adds analyses or information about a proposal but does not
11 substantially change the analysis of significant impacts and alternatives in the
12 existing environmental document.

13 SEPA requires that environmental impacts be analyzed "at the earliest possible point
14 ... when the principal features of a proposal and its environmental impacts can be
15 reasonably identified."³⁷ The City's process invests the Director of Community Development
16 with the responsibility to complete SEPA review prior to the planning commission and
17 council review, and does not explicitly mention the potential of a SEPA addendum. In this
18 case, the addendum addressing the Mary's Place amendment was released after the
19 Planning Commission had already acted on the matter.

20 In **Issues 7 and 8**, Petitioner argues that WAC 197-11-055(2) requires that the SEPA
21 addendum should have been submitted during the Director-recommendation stage, and that
22 the failure to do so violates the requirement of environmental review "at the earliest possible
23 point in the planning and decision making process, as required by WAC 197-11-055(2)."³⁸

24 The City responds by noting that the issue statement as it appears in the Prehearing
25 Order alleged violation of the guidelines set out in WAC 197-11-230(1), which was not
26 argued in the brief and deemed abandoned. Even in its absence, considering Petitioner's
27 argument to be directed only at the statute, the City points out that the Petitioner is focused
28 on "SEPA review" as a general matter. That review is, more specifically, a "detailed
29

30
31 ³⁷ WAC 197-11-055(2). The issues statements as they appear in the Prehearing Order identify WAC 197-11-
32 230(1)(a), (b) as applicable, but that regulation was not argued in the Petitioners' brief.

³⁸ Shorewood Brief at 21-22, citing BMC 19.65.080.3, 7.

1 statement” for “major actions significantly affecting the quality of the environment.” Finally,
2 the City argues that in reading SEPA as a whole it indicates that an EIS must be available to
3 “legislative decisionmakers” [sic] and not that an EIS must be available with “every
4 document produced at every stage of every review.”³⁹

5 Although Petitioner describes the amendment as creating a “75-foot monolith that
6 looms over its surroundings, with up to 200 dwelling units,”⁴⁰ they have not demonstrated
7 that the City Council did not have environmental information before them when they
8 adopted Ordinance 701. In fact, the City did have a Final Environmental Impact Statement
9 (FEIS) Addendum explaining that “specific development proposals may require a project
10 specific SEPA checklist.”⁴¹ Petitioner did not identify a specific SEPA requirement with
11 which the City has failed to comply in order to persuade the Board that a SEPA violation has
12 occurred.
13

14 **The Board finds and concludes** that Petitioner has not met its burden of proof that
15 the challenged ordinance violates RCW 43.21C.031(2) by failing to have the addendum
16 considered at the Director-recommendation stage.
17

18 In **Issues 9 and 10** Petitioner alleges that the FEIS Addendum released for the
19 Mary’s Place amendment was insufficient to comply with SEPA requirements. The
20 Addendum issued here relies on the 1997 FEIS for the Burien Comprehensive Plan.
21 Petitioner argues that the FEIS did not contemplate that the subject property would be
22 designated high-density multi-family (zoned RM-48) immediately adjacent to low density
23 house (zoned RS-12,000), and that none of the alternatives contemplated “the placement of
24 high-density multi-family development in the middle of the lowest density single-family
25 neighborhood.”⁴² Thus Petitioner argues that an addendum wasn’t an effective SEPA
26 vehicle, and the City should have prepared a new SEPA review.
27
28
29

30

³⁹ City and Intervenor’s Response at 29.

31 ⁴⁰ Shorewood Brief at 24.

32 ⁴¹ Shorewood Brief at Tab 6 at 2.

⁴² Shorewood Brief at 23.

1 The City responds by noting that RCW 43.21.034 specifically authorizes the use of
2 existing environmental documents that “adequately address environmental considerations
3 set forth in RCW 43.21C.030. The prior proposal or action and the new proposal need not
4 be identical but must have similar elements that provide a basis for comparing their
5 environmental consequences such as timing, types of impacts, alternatives, or geography.”
6 An Environmental Impact Statement (EIS) is adequate under the rule of reason when it
7 presents decision makers with a ‘reasonably thorough discussion of the significant aspects
8 of the probable environmental consequences.”⁴³
9

10 **In Issue 10**, Petitioner also cites various cases in support of their argument that the
11 project anticipated for Mary’s Place was sufficiently specific to require an EIS, complaining
12 that the amendment:

13 “The abrupt placement of a giant building with hundreds of new residents will
14 have significant adverse impacts on the existing low-density, open-space
15 neighborhood and constitute a “complete change of use of the existing area.”⁴⁴
16

17 Petitioner bears the burden of producing evidence of significant impacts so as to
18 require further environmental review. Under these facts, they have failed to do so. The
19 Petitioner offers no argument or analysis of how the environmental impacts of amendment
20 differ from the existing “Office” designation for this property, only the description of it as
21 being an “abrupt placement of a giant building” and that the multiple housing units
22 “potentially housing multiple people.” By way of illustration, the City notes that Alternative 3
23 of the 1997 EIS included moderate to high-density multifamily housing with design that
24 ensured blending into the “adjacent single-family neighborhoods.”⁴⁵
25

26 Petitioner must identify a specific GMA requirement with which the City has failed to
27 comply in order to persuade the Board that a violation has occurred. Petitioner has not
28 shown that the FEIS Addendum failed to disclose the likely adverse environmental impacts
29

30 ⁴³ City and Intervenor’s Response at 31, citing *Brinnon Grp. v. Jefferson Cty.*, 159 Wn. App. 446, 480, 245
31 P.3d 789, 806 (quoting *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation*
32 *Council*, 165 Wn.2d 275, 311, 197 P.3d 1153 (2008)).

⁴⁴ Shorewood Brief at 24.

⁴⁵ City and Intervenor’s Response at 32-33, quoting Tab 63, pp. 003789-90.

1 between the existing designation and FLUM. As in Issue 7 and 8 above, the City FEIS
2 Addendum explains that "specific development proposals may require a project specific
3 SEPA checklist." Again, for Issue 9 and 10, Petitioner did not identify a specific SEPA
4 requirement with which the City has failed to comply in order to persuade the Board that a
5 SEPA violation has occurred.

6 **The Board finds and concludes** that Petitioner has not met its burden of proof that
7 Ordinance 701 violates RCW 43.21C.031(2) by using a FEIS Addendum to support the
8 amendment.
9

10 **V. ORDER**

11 Based upon review of the petition, the briefs and exhibits submitted by the parties,
12 the GMA, prior Board orders and case law, having considered the arguments of the parties,
13 and having deliberated on the matter, the Board finds that Petitioner has failed to carry its
14 burden to prove that the City violated the GMA or SEPA. The Board closes this case.
15
16

17 SO ORDERED this 13th day of August 2019.
18

19 _____
20 Deb Eddy, Board Member

21 _____
22 Chery Pflug, Board Member

23 _____
24 Nina Carter, Board Member
25
26

27 **Note: This is a final decision and order of the Growth Management Hearings Board**
28 **issued pursuant to RCW 36.70A.300. A motion for reconsideration must be filed with**
29 **the Board and served on all parties within ten days of mailing of the final order. WAC**
30 **242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board**
31 **may appeal the decision to Superior Court within thirty days as provided in RCW**
32 **34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.**

Appendix A: Procedural matters

On February 14, 2019, Shorewood Neighborhood Preservation Coalition (Petitioner) filed a petition for review, which was assigned Case No. 19-3-0005.

The presiding officer held a prehearing Conference telephonically on March 12, 2019. On March 13, 2019, Motion to Intervene of No Child Sleeps Outside, LLC and Mary's Place Seattle was filed, and that motion was granted.

The Briefs and exhibits of the parties filed as follows:

- Petitioner's Prehearing Brief filed on May 16, 2019.
- Response Brief filed on June 5, 2019.
- Petitioner's Reply Brief filed on June 12, 2019.

Hearing on the Merits

The board panel convened a hearing on the merits June 19, 2019. The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions to understand the history of the ordinances, the facts in the case, and the legal arguments of the parties.

Appendix B: Legal Issues

Per the Prehearing Order, legal issues in this case were as follows:

1. Does the ordinance fail to identify and adopt “the best means for meeting an identified public benefit,” as required by BCC 19.65.095.6.A, in violation of the GMA, RCW 36.70A.130; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3) and WAC 365-196-600(10)?
2. Does the ordinance fail to achieve consistency with the compatibility requirements of GMA policy WAC 365-196-405(2)(k), and King County Countywide Planning Policies DP-38, DP-40, DP-44, as required by BCC 19.65.095.6.B, in violation of RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-196-010(1)(d); WAC 365-196-600(3); WAC 365-196-305(3); and WAC 365-196-600(10)?
3. By failing to meet the criteria in Burien Comprehensive Plan policy RE 1.9, LU 1.6, and the Salmon Creek Neighborhood Plan Policy HO 5.1.2, does the ordinance fail to achieve consistency with the comprehensive plan, as required by BCC 19.065.095.6.B, and create an internally inconsistent comprehensive plan, all in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); and WAC 365-196-600(10)?
4. By failing to demonstrate that the amendment “will result in a net benefit to the community,” as required by BCC 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); and WAC 365-196-600(10)?
5. By failing to demonstrate that the amendment “will be compatible with nearby uses,” as required by BCC 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); and WAC 365-196-600(10)?
6. By failing to demonstrate that “conditions have changed since the property was given its present Comprehensive Plan designation so that the current designation is no longer appropriate; or the map change will correct a Comprehensive Plan designation that was inappropriate when established,” as required by BCC 19.065.095.6.B, does the ordinance violate RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); and WAC 365-196-600(10)?
7. By failing to conduct SEPA review prior to submitting the proposed amendment to the Planning Commission, has the City acted in violation of SEPA, RCW

1 43.21C.030(2)(c) and SEPA implementing regulations, WAC 197-11-230(1)(a),
2 (b)?

3 8. By failing to conduct SEPA review prior to submitting the proposed amendment to
4 the City Council, has the City acted in violation of RCW 43.21C.030(2)(c) and
5 WAC 197-11-230(1)(a), (b)?

6 9. By attempting to use a SEPA addendum to analyze the environmental impacts of
7 this amendment, even though the amendment's environmental impacts were not
8 considered in a prior environmental impact statement, and the amendment
9 introduces substantial changes to those impacts that were previously considered,
10 has the City acted in violation of RCW 43.21C.030(2)(c) and WAC 197-11-600(3),
11 (4)?

12 10. Are the probable adverse impacts of the proposal sufficiently well-defined to allow
13 environmental review at this programmatic stage, and do those impacts require
14 preparation of an EIS, as required by RCW 43.21C.030(2)(c) and WAC 197-11-
15 055 and WAC 197-11-310?